

JS - 6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

| | | |
|-----------------------------|---|--|
| DANIEL FERNANDEZ, |) | Case No. EDCV 14-00806 DDP (ASx) |
| |) | |
| Plaintiff, |) | ORDER GRANTING PLAINTIFF'S MOTION |
| |) | TO REMAND |
| v. |) | |
| |) | [Dkt. No. 12] |
| BIG LOTS STORES, INC.; |) | |
| MOLLIE HALL; FRANK LaROCCO, |) | |
| |) | |
| Defendants. |) | |
| |) | |
| |) | |

Presently before the Court are Plaintiff's motion to remand (Docket No. 12), Defendants' motion to dismiss (**Docket No. 8**), and Defendants' motion for judgment on the pleadings (**Docket No. 9**). For the reasons stated in this order, the motion to remand is GRANTED. As a result, Defendants' motions are **VACATED AS MOOT**.

I. Background

Plaintiff Daniel Fernandez ("Plaintiff") commenced this action in San Bernardino County Superior Court against his former employer, Defendant Big Lots, Inc. ("Big Lots"), and individuals Mollie Hall ("Hall") and Frank LaRocco ("LaRocco"), alleging wrongful termination claims under California law. Defendants then

1 removed the action to this Court, invoking diversity jurisdiction
2 and claiming that Hall and LaRocco, California citizens, are sham
3 defendants. See 28 U.S.C. § 1332(a)(1). Plaintiff has moved to
4 remand the action to the state court, arguing that (1) Defendants
5 Big Lots and Hall have failed to make a sufficient showing
6 concerning their failure to obtain co-defendant LaRocco's joinder
7 to the Notice of Removal; (2) Defendants have failed to meet their
8 burden of showing that Big Lots' principal place of business is in
9 Ohio; (3) the minimum jurisdictional amount in controversy for
10 diversity jurisdiction does not exist because Plaintiff has
11 stipulated that he is not seeking in excess of \$75,000; and (4)
12 Defendants have failed to meet their burden of showing that Hall
13 and LaRocco are sham defendants.

14 **II. Legal Standard**

15 A defendant may remove a case from state court to federal
16 court if the case could have originally been filed in federal
17 court. 28 U.S.C. § 1441(a); see also Snow v. Ford Motor Co., 561
18 F.2d 787, 789 (9th Cir. 1977). As the removing party, Defendant
19 bears the burden of proving federal jurisdiction. Duncan v.
20 Stuetzle, 76 F.3d 1480, 1485 (9th Cir. 1996); see also Matheson v.
21 Progressive Specialty Ins. Co., 319 F.3d 1089, 1090 (9th Cir.
22 2003). The removal statute is strictly construed against removal
23 jurisdiction, and federal jurisdiction must be rejected if any
24 doubt exists as to the propriety of removal. Gaus v. Miles, Inc.,
25 980 F.2d 564, 566 (9th Cir. 1992) (explaining that courts resolve
26 doubts as to removability in favor of remand).

27 ///

28 ///

1 **III. Discussion**

2 Defendants have removed this action on the basis of diversity
3 jurisdiction. Plaintiff makes several arguments in his motion to
4 remand, challenging both the removal process itself and Defendants'
5 claim that this Court has jurisdiction over the action. However,
6 because the Court finds that Defendants have not met their burden
7 of showing that Hall and LaRocco are sham defendants, the Court
8 need not reach Plaintiff's other arguments.

9 Defendants removed the action pursuant to 28 U.S.C. § 1441(b),
10 which permits removal under this Court's diversity jurisdiction, 28
11 U.S.C. § 1332. Generally, "[t]he presence of the non-diverse party
12 automatically destroys original [subject matter] jurisdiction."
13 Wisconsin Dept. of Corrections v. Schacht, 524 U.S. 381, 389
14 (1998). However, "[i]f the plaintiff fails to state a cause of
15 action against a resident defendant, and the failure is obvious
16 according to the settled rules of the state, the joinder of the
17 resident defendant is fraudulent." McCabe v. General Foods Corp.,
18 811 F.2d 1336, 1339 (9th Cir. 1987); see also Zogbi v. Federated
19 Dept. Store, 767 F.Supp. 1037, 1041 (C.D. Cal. 1991). Such
20 fraudulently joined "sham defendants" should be disregarded for
21 purposes of subject matter jurisdiction. See McCabe, 811 F.2d at
22 1339. However, if a resident defendant is not fraudulently joined,
23 the case should be remanded to state court pursuant to 28 U.S.C. §
24 1447(c). See Hunter v. Philip Morris USA, 582 F.3d 1039, 1048 (9th
25 Cir. 2009).

26 In applying the fraudulent joinder rule, it should be
27 emphasized that the state law must be "settled" and the complaint's
28 deficiency must be "obvious." See McCabe, 811 F.2d at 1339. These

1 standards reflect the "general presumption against fraudulent
2 joinder" that complements the "strong presumption against removal
3 jurisdiction." Hunter, 582 F.3d at 1046. "Federal jurisdiction must
4 be rejected if there is any doubt as to the right of removal in the
5 first instance." Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir.
6 1992). Under these principles, federal courts in this circuit have
7 applied the fraudulent joinder rule only in cases where it is
8 undisputably clear or "obvious" that the plaintiff states no cause
9 of action against the non-diverse defendant. See, e.g., Kruso v.
10 International Telephone & Telegraph Co., 872 F.2d 1416, 1427 (9th
11 Cir. 1989) (affirming finding of fraudulent joinder where "none of
12 the plaintiffs were personally involved in any of the transactions
13 in question," which "deprives plaintiffs of standing to sue
14 defendants"); McCabe, 811 F.2d at 1339 (affirming finding of
15 fraudulent joinder in wrongful discharge action where non-diverse
16 defendants had acted in managerial capacity and California law
17 privileges any conduct in which "an advisor is motivated in part by
18 a desire to benefit his principal"); Maffei v. Allstate California
19 Ins. Co., 412 F.Supp.2d 1049, 1053 (E.D. Cal. 2006) (dismissing
20 claims against non-diverse corporate defendant where evidence
21 showed that defendant "has never conducted any business of any kind
22 anywhere"); Brown v. Allstate Ins. Co., 17 F.Supp.2d 1134, 1136-37
23 (S.D. Cal. 1998) (dismissing claims against non-diverse individual
24 defendants where defendants were named in complaint caption and
25 headings but "no material allegations against these defendants are
26 made" and defendants' names were entirely absent from "the body of
27 the complaint"); Gasnik v. State Farm Ins. Co., 825 F.Supp. 245,
28 249 (E.D. Cal. 1992) (dismissing claims against non-diverse

1 insurance agents where state statute, case law, and parties'
2 express contractual agreement established that insurance company
3 accepted responsibility for the defendant agents' activities);
4 Zogbi v. Federated Dept. Store, 767 F.Supp. 1037, 1041-42 (C.D.
5 Cal. 1991) (dismissing claims for breach of employment contract
6 against non-diverse individual defendants, as defendants were
7 plaintiff's managers and were not parties to the employment
8 contract).

9 In the present case, Plaintiff's Complaint alleges facts
10 regarding the conduct of Defendants Hall and LaRocco, as well as
11 Big Lots, and brings claims pursuant to California Labor Code
12 Sections 98.6, 132a, and 1102.5. (Complaint ¶ 11.) Section 98.6
13 provides that "[a] person shall not discharge an employee or in any
14 manner discriminate, retaliate, or take any adverse action against
15 any employee ... because the employee ... engaged in any conduct
16 delineated in this chapter." Cal. Labor Code § 98.6(a) (emphasis
17 added). Further, the statute provides that "[a]n employer who
18 violates this section is liable for a civil penalty." Cal. Labor
19 Code § 98.6(b)(3) (emphasis added). Defendants argue that the §
20 98.6 retaliation claims against Hall and LaRocco fail as a matter
21 of law because that code section can only be used for a claim
22 against the company-employer, not an individual supervisor. (Notice
23 of Removal ¶ 15.) Defendant cites to Section 98.6(b)(1), (2), and
24 (3), where it is stated that an "employer" is liable to an employee
25 for violations of the provision.¹

26
27 ¹Defendant also argues that Plaintiff's action pursuant to
28 Section 132a fails as a matter of law because the Court lacks
jurisdiction over it. (Notice of Removal, ¶ 15, n.2 (citing Gwin v.
(continued...))

1 Defendants cite to no California cases interpreting § 98.6 in
2 a way that supports their position, but instead cite only to the
3 statute itself, emphasizing the word "employer." In similar
4 circumstances, California district courts have relied on California
5 cases interpreting other, similar non-Labor Code statutes. See,
6 e.g., Thompson v. Genon Energy Services, LLC, 2013 WL 968224, at *4
7 (N.D. Cal. 2013). In the absence of clear case law interpreting the
8 issue of who may be held liable under § 98.6, in deciding whether
9 Hall and LaRocco are sham defendants, the Court declines to
10 anticipate how the California courts would handle the question of
11 individual liability under § 98.6. See id.

12 In Thompson, the court was asked to analyze Labor Code Section
13 6310(a) in the context of a motion to remand. Id. It noted that
14 subsection (a) of the provision provides that "[n]o person shall
15 discharge or in any manner discriminate against any employee
16 because the employee has done any of the following" Id.
17 (citing § 6310(b)). It then noted that subsection (b) then provides
18 that "[a]ny employee who is discharged ... or ... discriminated
19 against in the terms and conditions of employment by his or her
20 employer because the employee has made a bona fide oral or written
21 complaint ... of unsafe working conditions, ... shall be entitled
22 to reinstatement and reimbursement for lost wages and work benefits

23
24 ¹(...continued)
25 Target Corp., 2013 U.S. Dist. LEXIS 139891, 21 (N.D. Cal. 2013)
26 (Workers' Compensation Appeals Board has exclusive jurisdiction
27 over employee's wrongful termination claim under Section 132a.)
28 Defendant further argues that Plaintiff's action pursuant to
Section 1102.5 is barred by the one-year statute of limitations for
a Section 1102.5 action. (Id. (citing Cal. Code Civ. Proc. § 340).)
However, as the Court finds that the § 98.6 claims may be stated
against Hall and LaRocco, the Court need not address Defendants'
arguments with respect to the other code sections.

1 caused by the acts of the employer." Id. (citing § 6310(b)). The
2 Thompson court remanded the case for lack of diversity
3 jurisdiction, explaining that because "generally applicable laws do
4 impose on individuals the obligation not to retaliate," it was "not
5 ... obvious under the settled law of California that an action
6 cannot proceed against individual supervisors under Labor Code §
7 6310." Id. at *5. Further, the use of the word "person" in §
8 6310(a) supported an interpretation of the statute that would allow
9 individuals to be held liable for retaliation. Id. Therefore, the
10 court reasoned that defendants had failed to meet the "heavy burden
11 required to justify removal based on fraudulent joinder." Id.

12 Section 98.6 has a parallel structure to Section 6310. §§
13 98.6(a-b), 6310(a-b). Therefore, the Court finds that the reasoning
14 of Thompson is persuasive as applied to § 98.6. The Court is
15 unwilling to speculate as to whether California courts would
16 interpret § 98.6 as applicable only to employers or whether it also
17 applies to individuals or "persons." See Thompson, 2013 WL 968224 ,
18 at *5 ("While the policy arguments in the California cases may be
19 powerful, relevant – even persuasive – it 'clearly would be
20 inappropriate for this court in the context of a motion for remand
21 to examine California public policy and determine whether
22 California courts would be willing' to apply these arguments in
23 ways in which they have not yet done so." (quoting Briano v.
24 Conseco Life Ins. Co., 126 F.Supp.2d 1293, 1297 (C.D. Cal. 2000));
25 see also McCabe v. General Foods Corp., 811 F.2d 1336, 1339 (9th
26 Cir.1987)).

27 Therefore, the Court finds that it is not clear or settled
28 that Plaintiff cannot pursue a § 98.6 claim against Hall and/or

1 LaRocco. As a result, Defendants fail to meet the "heavy burden
2 required to justify removal based on fraudulent joinder." Marble v.
3 Organon USA, Inc., 2012 WL 2237271, at *6 (N.D. Cal. 2012). Because
4 Hall and LaRocco are nondiverse defendants, their continued
5 presence in this action destroys complete diversity. Therefore,
6 Plaintiff's motion for remand is GRANTED.

7 **IV. Conclusion**

8 For the reasons stated in this order, the motion to remand is
9 GRANTED. This action shall be remanded to the state court.
10 Defendants' pending motions are VACATED AS MOOT.

11
12 IT IS SO ORDERED.

13
14
15 Dated: July 10, 2014


DEAN D. PREGERSON
United States District Judge

16
17
18
19 cc: order, docket, remand letter to
20 San Bernardino County Superior Court,
21 No. CIVDS1403021
22
23
24
25
26
27
28